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EFFECTIVE IMPLEMENTATION OF THE SURFACE MINING ACT: GIVE STATES A CHANCE

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A little over eight years ago, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA) establishing, for the first time, comprehensive national standards for the surface coal mining industry. SMCRA represented one of the most complex and controversial statutes ever written and culminated a bitter political struggle that spanned nearly a decade. Yet, soon after President Carter signed the bill on August 3, 1977, it quickly became apparent that the struggle was far from over. Mr. Carter and the environmentalists complained the bill did not go far enough to curb mining abuses, while the industry warned that the law would add unnecessarily to the price of coal and force smaller producers out of business. Today, both sides can provide substantial evidence for their cases, but one thing is certain; rather than settling the issues surrounding surface coal mining regulation, SMCRA simply set the stage for continued debate.

I. PRE-SMCRA POLITICAL ENVIRONMENT

In order to evaluate the current effectiveness of SMCRA and its impact on the coal industry, it is important to understand the political environment that existed when the law was enacted. Much of the ideology that is the foundation of the federal law had its roots in the political and social upheaval of the 1960s. Heightened public awareness and concern over the impact of industrial pollution began to focus attention on how American business conducted its affairs. Lyndon Johnson's Great Society promoted the concept that a centralized federal government, rather than the states, was more capable in promoting and protecting the health and welfare of the citizens. Finally, the activism arising during the Vietnam War era was followed by the formation of professional environmental and consumer organizations working to insure that Congress and the government bureaucracy was responsive to the "public interest."

All these factors came together at the beginning of the 1970s as the environmental movement swept the nation. An incredible array of major programs were adopted during the decade which will always be remembered as the watershed for national environmental legislation. In less than eight years, Congress enacted the Clean Air and Clean Water Acts (later amending and strengthening both) and established the Environmental Protection Agency (EPA). Then in succession came a complete overhaul of the federal coal leasing program, passage of the Endangered Species Act, the Resource Conservation Recovery Act to address the problems of hazardous waste, and wilderness protection statutes which place millions of acres of coal reserves off limits to development. Finally, Congress passed SMCRA and created the Office of Surface Mining Reclamation and Enforcement (OSM).

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Each of these programs impacted coal by increasing production costs, restricting markets, and blocking development of vast untapped reserves. Add the cost of the Mine Safety and Health Act, the Black Lung program, and legislation that has all but deregulated rail rates for coal shipments and it becomes clear why many coal producers are fighting for their economic survival. Presently, twenty-eight major federal regulatory programs administered by twenty agencies have jurisdiction over coal. Of course, numerous corresponding and duplicative laws exist at the state and local level. Virtually every conceivable facet of the industry, from mining, moving, and using coal, is closely regulated by a phalanx of government overseers.

II. THE POLITICS OF SMCRA

Over eight years since enactment, SMCRA continues to stir controversy and now is subject to more scrutiny than at any time in its history. Why does the issue remain so volatile? Much can be attributed to the history of the law itself. The political debate began in earnest with legislation calling for the outright abolition of surface coal mining in the late 1960s. When that idea failed to gain momentum, serious efforts began for a comprehensive regulatory program. Between 1971 and 1977, four successive bills were introduced with each version being more stringent than the one before. Twice legislation was passed by Congress but vetoed by President Ford. The debate raged through four Congressional sessions marked by growing polarization between coal interests and environmentalists. When the final version passed in 1977, it contained well over one hundred specific performance standards which established it as one of the most detailed and technical statutes ever written. As the last of the major environmental laws, SMCRA borrowed heavily from its predecessors and may well be the best example of legislation of its kind. It is totally comprehensive in scope and contains a virtual wish list of environmentalist demands. For the coal industry and regulators, it presents a large cookbook which dictates every possible requirement leaving little room for flexibility or innovation.

While some view the exact nature of the performance standards as providing the necessary regulatory base-line, the law's two-phased implementation scheme injects considerable uncertainty for the regulated community. Taking a page from the Federalist's notebook, SMCRA envisions an initial program with concurrent state and federal authority with the states eventually assuming the primary responsibility while the federal government recedes to an oversight role during the permanent program. To date, this transition has occurred with significant difficulty. The ambiguities most observers associate with this oversight role arise from OSM's inability to give credence to Congress' desire that the states administer the day-to-day permanent program. In the end, a considerable price has been exacted from industry and consumers for this experiment in federalism.

III. THE ECONOMICS OF SMCRA

SMCRA is an extraordinary challenge for everyone affected by its implementation. One stated purpose of the Act clearly reveals the magnitude, if not the dif-

ficulty, of the challenge: "[A]ssure that the coal supply essential to the Nation's energy requirements . . . is provided and strike a balance between protection of the environment . . . and the Nation's need for coal as an essential source of energy."¹ Small operators bear the heaviest burden in this balancing act, although, history (as recently as the 1970s oil crisis) demonstrates that small operators provide a reliable resource for ensuring that the nation meets its energy demands.

From permitting through enforcement, the balance has not been reached in terms of recognizing the industry structure. The permitting process is a maze of paperwork, engineering, and environmental studies which constitute a miniature environmental impact statement for each site. Lacking in-house capability, small companies generally must contract with outside consultants for most of this expensive work. To obtain a permit, an operator must secure performance bond coverage. But under the inflexible bonding regulations the surety industry considers most small producers a bad risk. Thus, bonds for small companies are prohibitively expensive (many must post one hundred percent collateral) or not available at all. This bonding crisis forces some companies out of business, not because of their inability to comply with the Act, but because their corporate balance sheets do not meet the surety requirements.

OSM's rigid approach to oversight has added to the considerable uncertainty already existing because of the absence of a stable permanent regulatory program. More frequently we see federal intervention and citations which arise from disputes of subjective judgment between OSM and state inspectors. Of course, the operator has the legal right to challenge all violations, but at a substantial expense. It is often cheaper to pay the fine than pursue a legal remedy to vindicate the states' interpretation which allowed for the practice cited by OSM as a violation. The constant federal-state disputes place the operator in the middle and further diminishes industry's ability to engage in the long term planning necessary for an efficient coal mine operation.

The increased production cost due to SMCRA has been estimated between four dollars and eight dollars per ton. Small companies supplying the spot market do not generally have contracts whereby such increased costs can be passed through. In today's competitive market, producers must absorb these costs which places them at an additional disadvantage.

Larger corporations have the in-house expertise to deal with most of these problems and long-term contracts usually allow them to pass increased costs on to the purchaser. But these and other factors make SMCRA a particularly expensive proposition for small operators. If you factor in the additional burden of the other major regulatory programs, it is easy to see why many have left the business over the past ten years. According to statistics from the Mine Safety and Health Administration, over sixty percent of the small mines (those producing less than 100,000

tons per year) have closed since 1977. Ten years ago there were over 7,000 companies producing coal. Today there are less than 3,500. With today's tight market conditions and the continuing over-capacity in the industry, the outlook for small producers appears bleak. Fewer small producers in the market mean less competition and that of course will ultimately lead to higher energy prices for the nation. In the macroeconomic equation, higher energy costs translate into the further erosion of competitiveness for many of the country's basic industries.

IV. MEASURING SMCRA SUCCESS

Continuing debate surrounds the question of whether SMCRA works. As many answers exist as there are constituencies impacted by the program. Further consideration arises from the current trend to judge the program within the confines of partisan political debate. Rhetoric, statistics, and reports have become the measure of success or failure, rather than a reasoned technical evaluation of results on the ground. Political solutions to technical or scientific problems seldom address real-life circumstances and generally prove ineffective. Isolated program deficiencies involving one segment of the program have distracted observers from the progress attained in other major program components. The fact remains that despite the complexity of the statute and the continuing public and political scrutiny, tremendous progress has been made in a relatively short time.

A. *Reclamation Success*

The establishment of minimum national standards eliminated many of the inequities in surface mining regulation which existed among the states prior to 1977. While some performance standards remain unduly rigid, for the most part the standards are attainable and the vast majority of both small and large producers achieve compliance.

The regulatory reform effort of 1981 through 1983 infused the national regulatory program with the flexibility necessary to remove impediments which choked-off innovative operation and reclamation techniques. It changed the detailed design standards to the performance standards originally intended by Congress. The new rules embodied sufficient guidance for the states' adoption of program requirements tailored to local needs and conditions. Unfortunately, the federal courts have dealt a set-back to OSM's progress. However, OSM should vindicate its efforts through necessary appeals and propose other performance standards remanded on procedural grounds.

Clearly the need exists for establishing a fair and stable national program. A program in constant flux impedes the planning process in industry and the states. A higher level of compliance will occur once OSM establishes a regulatory baseline with certainty.

While some problems remain with the national program, the Act works in terms of reclamation success and environmental protection. They say the proof is in the

pudding, and anyone visiting a modern surface coal mine will find the positive impacts of SMCRA inescapable. On the ground, where it counts, the Act is achieving its intended goals.

B. *Failed Federalism*

SMCRA places with the states the primary responsibility for developing and administering regulatory and enforcement programs. The statutory scheme creates a unique relationship between OSM and the state regulatory authorities. Indeed, as the cornerstone of the Act, primacy is a vital ingredient to the program's success. Under primacy, each state develops a program to meet the mandate of the federal statute. Once approved by OSM, the federal agency retreats to an oversight role to ensure each state properly administers its approved program. State primacy must work for the national program to succeed. However, an effective federal-state relationship requires cooperation, trust, and flexibility—three commodities currently in short supply.

Today, growing conflicts between state and federal regulators seriously threaten state primacy. The basic problem arises from OSM's unwillingness to turn the program's day-to-day operation over to the states as stipulated by Congress. The central issue is the program's inability to address and resolve interpretational disputes which arise when OSM and the state disagree on statutory or program intent. Presently, when OSM disagrees with a state decision, it notifies the state to take corrective action. If the state fails to respond in a manner which OSM deems "appropriate," OSM then moves directly against the operator for the alleged violation.

Providing no means to challenge the federal decision, OSM's approach effectively removes the state as the regulatory authority. The operator, of course, finds himself in the middle of a hopeless situation, caught between the two agencies. His crime? Simply doing what the state told him to do to comply with the federally approved state program requirements. Operators can challenge OSM, and they often do, but it requires a costly and lengthy court battle. However, even when operators prevail, OSM has brashly maintained that they are bound neither by a state determination nor by decisions from a court of law. Such arrogance hardly fosters the cooperative spirit essential to the program's success.

The obvious contradiction inherent in OSM's approach to oversight has inflicted serious injury to the credibility of the program. Nearly 3000 ten-day notices² have been issued since 1982 and the tactic has clearly been used by some federal bureaucrats to modify state programs through intimidation. De facto program modifications occur without benefit of formal procedures. States have no formal mechanism to challenge OSM and the agency remains all too quick to use the threat

² Generally, the 10-day notice, as codified under 30 U.S.C. § 1271(a)(1), provides that OSM cannot take enforcement action upon the discovery of an apparent SMCRA violation in a state which has attained primacy until OSM notifies the state and gives the state 10 days in which to take "appropriate action."

of cutting-off Abandoned Mine Land grants needed to fund reclamation projects. More importantly, OSM's approach sends mixed signals to the regulated community who require certainty to facilitate their planning process.

We strongly believe that when OSM approves a state program the state should be free to make decisions unencumbered by the interpretational whims of federal bureaucrats. That, after all, is the point of having a federally approved program. States also need more discretion to adopt program standards to meet local needs. OSM should afford the states greater deference in the interpretation and implementation of their programs. One must remember that the federal law borrowed many of its provisions from pre-existing state reclamation laws.

It has been proven that the strict cookbook approach to enforcement is unrealistic. Each mine site is unique and every situation is different. Inspectors must have flexibility to make reasoned evaluations on a case-by-case basis. The standard should be "are we meeting the program requirements," not simply "are we writing enough violations?" If OSM disagrees with the state's interpretation, it should be a matter between the two agencies, not OSM and the operator. If steps are not soon taken to make state primacy work, serious problems will continue for coal producers and the states. The possibility lingers that some states, out of sheer frustration, may well choose to turn the programs back to OSM. Such a move will prove disastrous for the federal agency and remove any doubt as to whether state primacy has any meaning under the present program.

OSM's implementation of SMCRA has become an easy target for leveling criticism. However, the critics cannot continue simply casting the blame upon "inept" bureaucrats, "uncooperative" state regulators, or "irresponsible" coal operators. Some of the problems we see today arise from a complex statute which often dictates a constrained approach to regulation within a delicate state-federal framework. Therefore, it is no surprise that the critics presently conduct the evaluation of SMCRA in terms of punitive measures rather than an objective evaluation of overall reclamation success.

Congressman Morris Udall, the chief architect of the law, has stated on several occasions that SMCRA is "not cast in stone" and that he remains willing to propose necessary changes at the right time. After an eight year trial period, the time may be right to extend the evaluation process from implementation to the law itself. In some respects, nothing short of statutory change will suffice.

V. CONCLUSION

The long pre-enactment history of SMCRA only set the stage for the further debate on the issue of whether a cooperative federalist scheme successfully implements a national program for regulating the coal industry. The minimum national standards go far in placing producers on equal footing, and the numerous examples of quality reclamation demonstrate that the Act can achieve its intended

purpose. However, a flexible regulatory approach which accounts for the industry's structure remains vital to the fair and successful implementation of the law's objectives. OSM's approach to oversight could use further self-examination. The affected constituencies will be better served if the federal agency focuses its efforts on major issues and trends rather than the case-by-case confrontation which presently predominates its oversight process. For the federalist scheme to work, and if primacy is to have any meaning under SMCRA, OSM must accord the states deference in the implementation of the law.

